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No. 83-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PITTSBURG & MIDWAY COAL MINING CO.,
Appellant,

v.

REVENUE DIVISION, TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Appellee.

On Appeal from the Court of Appeals of New Mexico

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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New Mexico urges that its power to impose its gross receipts tax on the proceeds of appellant's sales of coal for transportation to Arizona, there to be burned, is so clearly established by authority that this Court can dispose of this appeal summarily without receiving briefs or hearing argument. The authority New Mexico principally relies on is *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). We have explained in the jurisdictional statement that this case fits into the line of cases that begins with *Coe* v. *Errol*, 116 U.S. 517 (1886), and continues through *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974); we have explained further that on the authority of those cases the *Complete Auto Transit* test may not be applicable to a tax imposed by the state of export once

goods have commenced an interstate journey. We have also explained that, because the New Mexico tax is unapportioned and therefore threatens duplicative taxation of an interstate transaction and discriminates against interstate commerce, the New Mexico tax does not in any event satisfy the *Complete Auto Transit* test. New Mexico's motion does not begin to refute our explanation of why the question of the validity of its gross receipts tax as applied here is substantial.

We respond below to a few of the particular points made in New Mexico's motion, points either separate from or subsidiary to the main points on which issue is fairly joined.

1. New Mexico makes a separate contention that, because title to the coal passes when it is delivered to a common carrier for transportation to Arizona, the coal sales transactions are intrastate and not interstate transactions. (Motion 6-10.) That is a forlorn contention, given the state of the authorities. In none of the cases cited by New Mexico or in any other that we have found has this Court held that a transaction in which goods are delivered to a common carrier for transportation out of the taxing state may be taxed as an intrastate transaction. New Mexico's contention is refuted by the comment of the Court in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 84 (1946), a leading case in the *Coe* v. *Errol* line, that the passage of title upon delivery to a ship (not even a common carrier in that case) was "a step in the export process" and not a taxable local incident. *See also A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 69 (1923).

The contention is, furthermore, inconsistent with the opinion of the New Mexico Court of Appeals, which did not rule that the coal transactions were intrastate

transactions. (Jur. St. 6.) And, in the end, the contention is irrelevant. If a single proposition stands out in the rest of New Mexico's motion, it is that we have moved past the era in which labels—"intrastate," "interstate," "direct," "indirect"—were necessarily dispositive of the validity of a state tax on a particular transaction. Specifically, this Court has ruled that, if a transaction that is technically an intrastate transaction affects interstate commerce, a tax on it is to be judged against commerce clause standards. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 614-17 (1981). At the very least, New Mexico's gross receipts tax as applied to a sale of coal for use outside New Mexico affects interstate commerce as much as Montana's severance tax on the extraction of coal that would someday be shipped to points outside Montana.

2. New Mexico says that, because the incidence of Arizona's use tax is formally on the buyer that first puts a commodity to use, appellant cannot urge that its sale of coal is subjected to duplicative taxation by two states. (Motion 15-17.) Whatever the formal incidence of the tax, Arizona is attempting to collect it from appellant as the seller, as the Arizona statute quoted at page x of the motion empowers it to do. Ariz. Rev. Stat. Ann. § 42-1411. Almost by definition, state use taxes formally fall on the buyer/user. That fact has not presented this Court and the scholars from being concerned about the potential for multiple taxation that resides in the levying of taxes by both the state of sale/shipment and the state of purchase/receipt/use.

Professor Lockhart, who has inquired deeply into the issue, has described this Court's use tax rulings as permitting "the buyer's state to impose the equivalent of the sales tax on the buyer for use of the product within the state and to require out-of-state sellers subject to the

buyer's state's jurisdiction to collect the tax for the state at the time of sale." Lockhart, *A Revolution in State Taxation of Commerce?*, 65 Minn. L. Rev. 1025, 1047-48 (1981). He goes on to say that we escape from the threat of duplicative taxation that resides in an unapportioned buyer-state tax only *if* the seller's state is not allowed to impose a tax (which would of course fall on the seller) on the interstate sale. *Id.* at 1048-49.

As we said in the jurisdictional statement, the minimum meaning of the *Coe* v. *Errol* line of cases is that sales effected by delivery to a common carrier within the seller's state are the equivalent of the sales effected by out-of-state delivery that this Court held New Mexico could not subject to its gross receipts tax in *Evco* v. *Jones*, 409 U.S. 91 (1972). In Professor Lockhart's view, it is the rule of *Evco* v. *Jones* that prevents the use tax from raising serious questions of multiple taxation. It is not the irrelevant fact that one tax is on the seller and the other on the buyer. The commerce clause protects interstate commerce itself from being burdened or discriminated against by duplicative taxation; the protection is not for "particular interstate firms." *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127 (1978). Certainly, there is no question of appellant's standing to assert the duplicative taxation objection to New Mexico's tax, as New Mexico attempts to argue (Motion 16 n.12), merely because the formal incidence of the Arizona tax is on the buyer.

So far as the credit that Arizona may offer for New Mexico taxes paid is concerned (Motion 17), we submit again that the issue, properly viewed, is one of state power and is not affected by the accommodation that a particular state may make as a matter of grace. The Court should consider whether, if it were to decide that the

unapportioned New Mexico tax was constitutional because of Arizona's present act of legislative grace, the tax would become unconstitutional if Arizona were later to withdraw its credit for equivalent taxes paid to another state.

3. New Mexico says that the rule of *Coe* v. *Errol*, which was clearly a case of domestic interstate commerce, now applies only to cases that arise under the export clauses of the Constitution. (Motion 22-26.) As we demonstrated in the jurisdictional statement, that is simply not so. In no case has this Court held that *Coe* v. *Errol* does not govern commerce clause cases as well as cases arising under either Section 9, clause 5, or Section 10, clause 2, of Article I. True it is that in *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62, 66 (1974), the Court said that the taxpayer's claim in *Coe* v. *Errol* was made under both the export-import clause and the commerce clause. That accurately described the taxpayer's claim. *See* 116 U.S. at 520; *cf. id.* at 521-22. But by 1886, the year of *Coe* v. *Errol*, it had been decided that the export-import clause had no bearing on merely interstate transactions, and the Court so recognized, 116 U.S. at 526; the commerce clause was the only serious ground for challenging the New Hampshire town's tax on logs in the Androscoggin River waiting to be floated to Maine, and the only ground that the Court considered.

New Mexico would also escape the rule of *Coe* v. *Errol*—that delivery to a common carrier marks the beginning of an interstate journey and therefore an interstate transaction—by conferring upon railroads that operate unit coal trains or otherwise carry coal in cars supplied by their customers an exemption from regulation as common carriers by the Interstate Commerce Commission. (Motion 24-25 n.23.) We are sure that New

Mexico's expansive reading of a very limited and inapposite provision of the Interstate Commerce Act as creating such an exemption would be a happy surprise to the Santa Fe and other rail carriers of coal. For their rates for transporting coal and other aspects of their coal carriage service are very much regulated by the ICC regardless of the ownership of the cars in which the coal is transported.

The ICC is right in asserting this jurisdiction and the railroads in accepting the assertion. The statutory provision that New Mexico invokes has no such exemptive effect as New Mexico ascribes to it. Section 11126(a) of Title 49, drawn from the former Section 1(12) of the Interstate Commerce Act, provides that a rail carrier must make a reasonable distribution of coal cars among the mines served by it and in times of car shortage keep a strict count of cars furnished to each mine. A sentence added to Section 1(12) in 1976 as a part of the Railroad Revitalization and Regulatory Reform Act, which New Mexico quotes in part as it read before codification (Motion 25 n.23), says (as codified) that "coal cars supplied by shippers or receivers are deemed not to be a part of the carrier's fleet and are not counted in determining a question about distribution or car count" for purposes of a number of provisions of Title 49. 49 U.S.C. § 11126(a).

The fact that, as the sentence added in 1976 says, a railroad need not take account of shipper-supplied cars in determining its distribution and car count duties does not make it any the less a common carrier. The railroad retains its common carrier duties of serving its customers adequately and of charging for its services just and reasonable and non-discriminatory rates, regardless whether the service is by traditional trains (with or without shipper-supplied cars) or by unit trains.

CONCLUSION

Probable jurisdiction should be noted so that this Court can hear this case and determine what rule should govern the taxation of interstate sales transactions to which the state of the seller proposes to apply an unapportioned tax on the entire proceeds of the sale without regard to any duplicative claim by the buyer's state.

Respectfully submitted,

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